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No. _____

In The

Supreme Court of the United States

October Term, 1998

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioner,

vs.

HAROLD DAWAVENDEWA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When enacting Title VII of the Civil Rights Act of 1964, Congress expressly exempted certain employment preferences "given to any individual because he is an Indian living on or near a reservation." § 703(i), 42 U.S.C. § 2000e-2(i). In *Morton v. Mancari*, 417 U.S. 535, 548, 94 S. Ct. 2474, 2481 (1974), this Court stated that § 703(i) is consistent with Congress' policy of promoting tribal sovereignty and self-governance, "the longstanding federal policy of providing a unique legal status to Indians in matters concerning tribal or 'on or near' reservation employment." The Ninth Circuit interpreted § 703(i) narrowly such that the Navajo tribe may not require employers located on reservation lands leased from the Navajo tribe to give employment preferences to members of the Navajo Nation over members of other tribes.

(1) Does the Ninth Circuit's interpretation frustrate Congress' intent of promoting tribal sovereignty and self-governance, particularly in light of Congress' recent explicit endorsement of tribal-based preferences in the context of the Indian Self-Determination and Education Assistance Act?

(2) Do the principles this Court announced in *Morton v. Mancari* require the conclusion that preferences given to Indians based on their tribal affiliation are political (and not based on race or national origin) and are therefore beyond the scope of Title VII altogether?

RULE 29.6 LISTING

Petitioner Salt River Project Agricultural Improvement and Power District is a municipal corporation and a political subdivision of the State of Arizona. It has no parent company or nonwholly owned subsidiary.

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PETITION FOR WRIT OF CERTIORARI

The Salt River Project Agricultural Improvement and Power District ("Salt River Project") respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 154 F.3d 1117. The opinion of the district court (App., *infra*, 20a-27a) is unreported.

JURISDICTION

The Ninth Circuit entered its judgment and opinion on September 14, 1998. The Ninth Circuit denied a timely petition for rehearing and suggestion for rehearing en banc on January 13, 1999. (App., *infra*, 28a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Civil Rights Act of 1964, § 703(i), 42 U.S.C. § 2000e-2(i):

> Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of

such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

STATEMENT OF THE CASE

A. Essential Facts.

Petitioner, the Salt River Project, is a municipal corporation and political subdivision of the State of Arizona. It operates an electric generation facility known as the Navajo Generating Station, which is located within the boundaries of the Navajo Indian Reservation.

The Navajo Generating Station was built on Navajo tribal lands pursuant to a lease the Salt River Project negotiated with the Navajo Nation in 1969. The lease expressly requires the Salt River Project to give employment preferences at the Navajo Generating Station to members of the Navajo Nation:

> Lessees agree to give preference in employment to qualified local Navajos, it being understood that "local Navajos" means members of the Navajo Tribe living on land within the jurisdiction of the Navajo Tribe. . . . In the event sufficient qualified unskilled, semi-skilled and skilled local Navajo labor is not available, or the quality of work of available skilled or semi-skilled workmen is not acceptable to Lessees, Lessees may then employ, in order of preference, first qualified non-local Navajos, and second, non-Navajos.

(App., *infra*, 2a-3a (n.2)).

The lease's employment preference requirement is similar to the requirement in the Navajo Preference in Employment Act, 15 Navajo Nation Code § 601 *et seq.* (1995), which the Navajo Nation enacted in 1985. The tribal statute requires that "all employers doing business . . . [on or near the reservation] of the Navajo Nation . . . shall . . . [g]ive preference in employment to Navajos." *Id.* at § 604(A)(1).

Respondent is a Hopi Indian who resides a few miles away from the Navajo Reservation. In 1991, he applied for employment at the Navajo Generating Station. When the Salt River Project did not select him, Respondent filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), challenging the Salt River Project's employment preferences for Navajos. The EEOC found in Respondent's favor and issued a Notice of right to sue.

B. Proceedings Below.

1. District Court.

Respondent filed suit against the Salt River Project in the federal district court for the District of Arizona. On behalf of himself and a proposed class, Respondent alleged that giving employment preferences to Navajos, as required by the Salt River Project's lease with the Navajo Nation, violated the prohibition against national origin discrimination in Title VII of the Civil Rights Act of 1964. Accordingly, Respondent alleged jurisdiction based on 28 U.S.C. §§ 1331, 1343 and 42 U.S.C. § 2000e-5.

The Salt River Project moved to dismiss Respondent's complaint, contending that employment preferences given to

Navajos under the lease requirement are exempt from Title VII's prohibitions. Title VII expressly states:

> Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

Civil Rights Act of 1964, § 703(i), 42 U.S.C. § 2000e-2(i). The Salt River Project alternatively argued for dismissal because distinctions between Navajo and non-Navajo Indians are political distinctions outside the purview of a national origin claim, relying on this Court's holding in *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474 (1974).

The district court held that interpreting the exemption in § 703(i) to permit tribal based employment preferences is consistent with the federal government's commitment to promoting tribal self-government. It found particularly persuasive Congress' recent explicit endorsement of "tribal employment rights ordinances (TERO) (which generally provide for tribal preferences in employment for tribal members)" in the context of the Indian Self-Determination and Education Assistance Act ("ISDA"). S. Rep. No. 374, 103d Cong., 2d Sess. 5 (1994).

The district court declined to follow an EEOC policy statement which interpreted § 703(i) as not permitting preferences based on tribal affiliation. It noted the EEOC had relied heavily on regulations issued by other agencies which – following Congress' endorsement of tribal affiliation preferences in the ISDA – had either been

effectively negated or been eliminated outright. Accordingly, the district court granted the Salt River Project's motion to dismiss.

Because it granted the motion to dismiss based on the Indian preference exemption in § 703(i), the district court declined to reach the Salt River Project's alternative argument based on *Morton v. Mancari*.

2. Court of Appeals.

Respondent appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit. The panel decision, authored by Judge Stephen Reinhardt, characterized the purpose underlying the Indian exemption in § 703(i) as allowing employment preferences to individual Indians "in order to compensate for the effects of past and present unjust treatment." (App., *infra*, 12a). Moreover, because the Ninth Circuit believed the ISDA and Title VII "have fundamentally different purposes," it concluded that Congress' recent amendment of the ISDA and its express endorsement of tribal ordinances requiring employment preferences based on tribal affiliation provide "no support" for the district court's interpretation. (App., *infra*, 14a-15a) ("whatever Congress decided to do with respect to amending the ISDA in 1994 has little if anything to do with what it intended when it drafted Title VII"). Consequently, the Ninth Circuit held that the Indian preference exemption in § 703(i) does not permit preferences based on tribal affiliation.

The Ninth Circuit also held that employment preferences based on tribal affiliation constitute national origin

discrimination under Title VII. (App., *infra*, 8a-9a). In doing so, the Ninth Circuit concluded that *Morton v. Mancari*'s holding – that employment preferences of Indians over non-Indians are political distinctions based on membership in "quasi-sovereign tribal entities," and not based on race – has no application in this case. Indeed, the Ninth Circuit characterized the preference at issue in *Morton v. Mancari* as one "based on a racial classification," but which nevertheless did not violate the constitution because it was motivated by the "legitimate non-racial purpose" of promoting tribal self-governance. (App., *infra*, 8a). The Ninth Circuit also concluded that the interests of Indian self-governance are "not present in this case." (*Id.*).

The effect of the Ninth Circuit's narrow interpretation of § 703(i) is that tribes no longer can require employers (either by contract, as in this case, or by tribal ordinance) to give employment preferences to their members. Yet, the Ninth Circuit decision fails to analyze or even discuss tribal sovereignty concerns. Similarly, although the Ninth Circuit acknowledges its interpretation creates a potential conflict between Title VII and the ISDA, it made "no attempt to resolve" the conflict because this particular case did not involve a self-determination contract under the ISDA.

REASONS FOR GRANTING THE PETITION

This case raises important issues of federal employment and Indian law which affect the inherent tribal sovereignty of Indian tribes throughout the country. Also,

the Ninth Circuit itself acknowledged that its holding creates (but leaves unresolved) a conflict between two important federal statutes. Moreover, the analysis in the Ninth Circuit's published decision is contrary to this Court's well-established Indian law and racial discrimination precedents, and results in an erroneous holding. For all these reasons, this petition for writ of certiorari should be granted.

I. This Case Raises Important Issues of Federal Employment and Indian Law, Affecting the Sovereignty of Hundreds of Indian Tribes Throughout the Nation.

The effect of the Ninth Circuit's narrow interpretation of § 703(i)'s Indian preference exemption extends well beyond a simple employment discrimination claim by an unsuccessful applicant against a single employer. Instead, the decision below raises important questions about inherent tribal sovereignty that go to the heart of the federal government's trust relationship with Indian tribes. Fundamentally, this case addresses whether Congress intended to abrogate inherent tribal sovereignty rights when it enacted Title VII.

This Court has long recognized that "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S.Ct. 905, 909 (1991) (quoting *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831)). Consistent with the notion of inherent sovereignty, this Court has repeatedly acknowledged "that tribes retain

considerable control over nonmember conduct on tribal land." *Strate v. A-1 Contractors*, 117 S.Ct. 1404, 1413 (1997). Indeed, although to a lesser degree, "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians . . . on non-Indian fee lands." *Montana v. United States*, 450 U.S. 544, 565, 101 S.Ct. 1245, 1258 (1981). Significantly, the Ninth Circuit itself has recognized that tribal inherent sovereignty includes the authority to enforce their own employment ordinances on employers doing business within their reservations, even when such employers are located on non-Indian fee land. *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991).

In this case, the Salt River Project – as required by the Navajo Nation – gives employment preferences to Navajos for jobs located on the Navajo Reservation. By holding that such preferences violate Title VII, the Ninth Circuit has significantly limited the Navajo Nation's right of self-governance with respect to its own lands and the economic activity on the reservation generally. The lease with the Navajo Nation which permits the Salt River Project to operate its electric generating facility on tribal lands requires the Salt River Project to give employment preferences to Navajos. The Navajo Nation viewed the employment preference provision of the lease as "the significant benefit of its . . . bargain" with the Salt River Project. *See* Navajo Nation's *amicus* brief filed in the Ninth Circuit in support of Petition for Rehearing at 2.

The Ninth Circuit's decision in this case effectively invalidates not only the preference provision in the Navajo Nation's lease with the Salt River Project, but also all other similar lease provisions with other employers

doing business on the Navajo Reservation. Furthermore, as the Ninth Circuit noted, the lease provision "is consistent with" a Navajo tribal ordinance which requires all employers on the Navajo Reservation to give employment preferences to Navajos. (App., *infra*, 2a-3a) (citing 15 Navajo Nation Code § 604 (1995)). Thus, the Ninth Circuit's decision also effectively invalidates the Navajo Nation's tribal ordinance. Such incursions on the inherent tribal right to control tribal lands and self-govern economic activities on the reservation raise important federal Indian law issues of tribal sovereignty.

The effect of the Ninth Circuit's decision, however, goes substantially beyond the important issues related to just the Navajo Nation. It also puts in doubt the validity of every similar lease provision and tribal employment rights ordinance used by any of the hundreds of federally-recognized Indian tribes throughout the nation.

Congress gave some indication in 1994 of the extent to which such ordinances requiring tribal-based preferences are used. At that time, Congress expressly endorsed the use of employment preferences based on tribal affiliation in the context of the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. § 450 *et seq.* The ISDA included a provision which required that employment preferences "shall be given to Indians." 25 U.S.C. § 450e(b)(1). Like the Ninth Circuit in this case, the agencies charged with interpreting the ISDA (the Department of the Interior and the Department of Health and Human Services) had narrowly interpreted "Indians" to require that employment preferences be given to all Indians, "regardless of tribal affiliation." 59 Fed. Reg. 3185 (Jan. 20, 1994) (proposed regulation).

Congress rejected that narrow view and amended the ISDA to make it clear that "the tribal employment or contract preference laws adopted by such tribe shall govern." 25 U.S.C. § 450e(c) (Supp. 1998). Explaining the need for the rejection of the narrow view, the Senate Report from the Committee on Indian Affairs noted that tribal employment rights ordinances enacted by the various tribes (sometimes referred to as "TEROs") "*generally* provide for tribal preferences in employment for tribal members." S. Rep. No. 374, 103d Cong., 2d Sess. 5 (1994) (emphasis added).

Accordingly, this case has important and potentially wide-spread implications for Indian tribes throughout the country. Under the Ninth Circuit's erroneous interpretation of § 703(i), each tribe's employment rights ordinance requiring employment preferences for tribal members (as well as similar lease requirements) would be unlawful. Indian tribes would not be able to enforce such ordinances or lease provisions with respect to employers doing business on or near their reservations – even if they are actually located on tribal lands. Such a dramatic effect on a fundamental principle of tribal sovereignty warrants this Court's review.

The need for review is particularly acute in this case. The Navajo Reservation, out of which this case arose, includes portions of four states: Arizona, New Mexico, Utah and Colorado. Thus, the Navajo Reservation encompasses territory in two circuits of the United States Court of Appeals (the Ninth and the Tenth Circuits). Conflicting resolutions of this issue between the two circuits would present a particularly unworkable situation for both the Navajo Nation, as well as employers attempting to do

business on the Navajo Reservation, caught between tribal law and the Ninth Circuit's erroneous decision.

II. The Ninth Circuit Decision Creates a Conflict With the Indian Self-Determination and Education Assistance Act.

This Court's review is also necessary to address a significant conflict the Ninth Circuit's decision creates between two important federal statutes. The Ninth Circuit concedes that, under its interpretation of the Indian preference exemption in § 703(i), "a conflict between Title VII and ISDA may arise when a private employer is hired pursuant to the ISDA." (App., *infra*, 17a (n.15)). That conflict exists because Congress expressly provided that tribal-affiliation preferences in a tribe's "employment or contract preference laws . . . shall govern" an employer operating pursuant to a self-determination contract, 25 U.S.C. § 450e(c), yet (under the Ninth Circuit's interpretation) such tribal laws violate Title VII and are therefore unenforceable.

Although the Ninth Circuit acknowledges that, under its interpretation, "a conflict between Title VII and ISDA may arise when a private employer is hired pursuant to the ISDA," it expressly makes "no attempt to resolve it." (App., *infra*, 17a (n.15)). Resolution of the conflict between federal statutes which the Ninth Circuit's erroneous decision creates warrants this Court's review.

III. The Ninth Circuit Decision Is Contrary to This Court's Well-Established Indian Law and Racial Discrimination Precedents.

This Court has not specifically addressed whether § 703(i) permits preferences based on tribal affiliation. Nor has it considered whether such preferences are based on political distinctions, not race or national origin, and are therefore beyond the scope of Title VII's prohibitions altogether. However, this Court's prior Indian law and racial discrimination decisions establish several important principles that govern this case. Review is necessary because the Ninth Circuit decision violates (and in some respects, altogether ignores) this Court's precedents, and therefore arrived at erroneous conclusions.

A. The Ninth Circuit Decision Ignores the Relevant Analytical Framework.

In a case such as this, involving statutory interpretation, a court's task is to ascertain the intent of Congress and give effect to it. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570, 102 S.Ct. 3245, 3250 (1982) ("Our task is to give effect to the will of Congress."). However, "the standard principles of statutory construction do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S.Ct. 2399, 2403 (1985). Instead, this Court has established a distinct analytical framework that applies when federal legislation raises issues of tribal sovereignty, self-governance or Indian law generally. Explaining the need for this distinct analysis, the Court stated:

> [T]raditional notions of Indian self-government are so deeply engrained in our jurisprudence

> that they have provided an important "backdrop" *against which vague or ambiguous federal enactments must always be measured.*
>
> . . . Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence.

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44, 100 S.Ct. 2578, 2583-84 (1980) (citation omitted; emphasis added); *see also Montana v. Blackfeet Tribe of Indians*, 471 U.S. at 766, 105 S.Ct. at 2403 ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit").

In this case, the Ninth Circuit completely ignored the analytical framework this Court has established for deciding important issues of federal Indian law. Indeed, notwithstanding the substantial effect its decision has on tribal sovereignty, the Ninth Circuit erroneously viewed this case as though it were simply a Title VII discrimination case. It did not view Title VII's Indian preference exemption against the backdrop of tribal self-government, and it did not resolve any ambiguity in that provision in favor of tribal sovereignty. In fact, nowhere in its decision did the Ninth Circuit address the effect of its decision on tribal sovereignty and self-governance at all. To the contrary, the Ninth Circuit went so far as expressly stating: "Native Americans' interests in self-governance [are] interests not present in this case." (App., *infra*, 8a).

Because it failed to use the required analytical framework, the Ninth Circuit misidentified Congress' underlying purpose in enacting the Indian preference exemption

in § 703(i). It erroneously concluded that Congress' purpose was "to compensate for the effects of past and present unjust treatment" of Indians. (App., *infra*, 12a). In stark contrast to the Ninth Circuit's conclusion, this Court, in *Morton v. Mancari*, characterized the purpose underlying Congress' enactment of § 703(i) (as well as the provision exempting tribes from Title VII's definition of "employer," § 701(b)), as follows:

> This exemption reveals a clear congressional recognition, within the framework of Title VII, of the *unique legal status of tribal and reservation-based activities*. The Senate sponsor, Senator Humphrey, stated on the floor by way of explanation:
>
> > "This exemption is consistent with the Federal Government's policy of encouraging Indian employment and with the *special legal position of Indians.*" . . .
>
> . . . .
>
> . . . These 1964 exemptions as to private employment indicate Congress' recognition of the longstanding federal policy of providing a *unique status to Indians in matters concerning tribal or "on or near" reservation employment*. The exemptions reveal a clear congressional sentiment that an Indian preference in the narrow context of tribal or reservation-related employment did not constitute racial discrimination of the type otherwise proscribed.

417 U.S. at 545-46, 548, 94 S.Ct. at 2480-81 (emphasis added) (quoting 110 Cong. Rec. 12723 (1964)); *see also* 110 Cong. Rec. 13702 (1964) (commenting on both of Title VII's Indian exemptions, Senator Mundt asserted they

would "assure our American Indians of the continued right to protect and promote their own interests. . . . ").

Thus, the fundamental purpose of § 703(i) – like that of the many other Indian employment preference laws Congress has enacted since 1934 – is to assist "Indian tribes . . . to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. at 542, 94 S.Ct. at 2479. That purpose is consistent with the "firm federal policy of promoting tribal self-sufficiency and economic development" which this Court has "repeatedly recognized" in the Indian legislation Congress has enacted over many decades. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143, 100 S.Ct. 2578, 2583-84 (1980).

The Ninth Circuit ignored *Morton v. Mancari*'s characterization of Congress' intent. Although it acknowledged the Salt River Project's reliance on the above-quoted language, the Ninth Circuit merely stated – without explanation – that *Morton v. Mancari* "does not support [the Salt River Project's] position." (App., *infra*, 12a-13a).

The Ninth Circuit compounded its error when it relied on its erroneous characterization of Congress' intent to justify ignoring Congress' recent express endorsement of employment preferences based on tribal affiliation in the context of the ISDA. It concluded that Congress' action with respect to the ISDA "provides no support" for the proposition that such preferences are also permitted under the exemption in § 703(i), because "the ISDA and Title VII have fundamentally different purposes." (App., *infra*, 14a-15a).

The Ninth Circuit's comparison of the underlying purposes of the ISDA and Title VII misses the point. Congress did not enact the Indian preference exemption in § 703(i) to further the anti-discrimination purposes of Title VII. Section 703(i) is, after all, an *exemption* from Title VII. Instead, legislative history makes it clear that Congress included the Indian preference exemption to promote tribal sovereignty and self-governance, in recognition of the "unique legal status of tribal and reservation-based activities." *Morton v. Mancari*, 417 U.S. at 545-46, 94 S.Ct. at 2480 (1974) (citing 110 Cong. Rec. 12723 (1964) (Sen. Humphrey)).

Thus, contrary to Judge Reinhardt's statement in the decision below, Title VII's two Indian exemptions and the ISDA have the same fundamental purpose. Significantly, just three weeks after Judge Reinhardt issued his opinion in this case, another panel in the Ninth Circuit stated that the ISDA and the Indian exemption in Title VII related to tribes (§ 701(b)) share the same underlying purpose:

> Congress sought to achieve *essentially the same goal* when it enacted the ISDEAA as when it excluded "tribes" from the operation of Title VII. Both the ISDEAA and the Title VII "tribe" exemption attempt to aid tribal entities in their efforts *to conduct their own affairs and economic activities with as much autonomy as possible.*

Pink v. Modoc Indian Health Project, Inc., 157 F.3d 1185, 1188-89 (9th Cir. 1998) (emphasis added).

The Ninth Circuit further compounded its error in failing to use the required analytical framework by adopting the EEOC's policy statement notwithstanding

recent changes to the law on which it is based. When the EEOC issued its policy statement in 1988, it relied heavily on regulations issued by the Department of the Interior and the Office of Federal Contract Compliance Programs (OFCCP). Since then, the Department of the Interior and the OFCCP's regulations on which the EEOC relied have been effectively negated.

The EEOC's policy statement expressly acknowledges that the Department of the Interior's regulations on which it relied "govern[ed] the implementation" of the ISDA's employment preference provision (25 U.S.C. § 450e). Obviously, after Congress expressly endorsed employment preferences based on tribal affiliation in connection with the 1994 amendments to the ISDA, Interior's regulations could no longer be valid. Not surprisingly, therefore, shortly after the 1994 amendments, the Department of the Interior's regulation on which the EEOC had relied was eliminated altogether. 60 Fed. Reg. 30791-92 (Jun. 12, 1995) (removing, among others, 48 C.F.R. § 1404.7000 *et seq.*). Although the other sections of Interior's regulations cited in the EEOC's policy statement (48 C.F.R. §§ 1452.204-71 and -72 (now redesignated as §§ 1452.226-70 and -71, *see* 60 Fed. Reg. 53280 (Nov. 13, 1995)) are still in the Code of Federal Regulations, they begin with: "As prescribed in 1404.7003(a) . . . " and "As prescribed in 1404.7003(b) . . . ," which sections no longer exist.

Similarly, although the OFCCP regulation on which the EEOC relied (41 C.F.R. § 60-1.5(a)(6)) is still in the Code of Federal Regulations, it is also effectively negated. When that regulation was promulgated in 1977, the

Department of Labor expressed the belief that its regulations "are consistent with . . . the Indian Self Determination and Education Assistance Act which also covers the preferential employment of Indians by certain Federal contractors," and "are fully compatible with" the ISDA. 42 Fed. Reg. 3455 (Jan. 18, 1977) (citation omitted). Again, in light of the 1994 amendments to the ISDA, the OFCCP regulations are clearly not "consistent" or "compatible with" the ISDA. *See* Limas, *Sovereignty as a Bar to Enforcement of Executive Order No. 11,246 in Federal Contracts with Native American Tribes*, 26 N.M.L. Rev. 257, 286 (1996) ("Congress' action in recognizing tribal preference laws in self-determination contracts reinforces the Congressional policy of tribal self-determination. OFCCP regulations reject tribal preference laws; thus, they run counter to federal policy and congressional intent.").

Accordingly, the 1994 amendments to the ISDA eliminate the foundation on which the EEOC's policy statement was built. There no longer is valid authority to support the EEOC's 1988 position. These changes have led some scholars to question "whether the EEOC will continue to take the position that preference based on tribal affiliation by a qualified employer violates Title VII." Buffalo & Wadzinski, *Application of Federal and State Labor and Employment Laws to Indian Tribal Employers*, 25 U. Memphis L. Rev. 1365, 1374-75 (1995). Although the EEOC asserted in an amicus brief filed in the Ninth Circuit that its position on this issue is unchanged, it clearly does so without the benefit of the authority on which it earlier relied.

Since the EEOC adopted its policy statement in 1988, Congress has unambiguously clarified its position with

respect to tribal-based employment preferences. Furthermore, the regulations on which the EEOC relied no longer support its conclusion. The Ninth Circuit's published decision erroneously ignored these recent developments as having "little if anything to do" with its task of construing the Indian employment preference exemption in § 703(i). (App., *infra*, 15a).

Thus, the Ninth Circuit's published decision ignores this Court's precedents when it mischaracterizes Congress' underlying intent and fails to construe § 703(i) consistent with its purpose of promoting tribal sovereignty and self-governance. This Court should grant the petition in order to correct this important error.

B. The Ninth Circuit Decision Creates an Apparent Conflict With *Morton v. Mancari*.

The Ninth Circuit decision also mischaracterizes and fails to comply with the principles this Court established in *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474 (1974). In that case, the Court rejected a constitutional challenge to Indian preference legislation brought by non-Indians, concluding that such preferences are politically, not racially, based:

> Literally every piece of legislation dealing with Indian tribes and reservations . . . single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn

> commitment of the Government toward the Indians would be jeopardized.
>
> . . . .
>
> Contrary to the characterization made by appellees, this preference does not constitute "racial discrimination." Indeed, it is not even a "racial" preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. . . . The preference is similar in kind to the constitutional requirement that a United States Senator, when elected, be "an Inhabitant of that State for which he shall be chosen," . . . or that a member of a city council reside within the city governed by the council. . . . *The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities.* . . .

Id. at 552-54, 94 S.Ct. at 2483-84 (emphasis added). Thus, because the preference was political and not racial, the Court held it was subject to the rational basis test and could survive a due process challenge merely by being reasonably related to a legitimate governmental purpose. *Id.* at 554-55, 94 S.Ct. at 2484-85.

Although *Morton v. Mancari* did not deal with the precise issue in this case, the principles it established clearly apply here. If preferences to Indians over non-Indians are political distinctions because Indians are members of "quasi-sovereign entities," then distinctions among Indians based on their membership in one of these "quasi-sovereign entities" is even more clearly a political distinction. Thus, employment preferences based on

tribal affiliation are beyond the scope of Title VII's general prohibitions altogether.

Despite the unequivocal statement in *Morton v. Mancari* that "this preference . . . is not even a 'racial' preference," the Ninth Circuit erroneously characterized *Morton v. Mancari* as holding "that the employment preference at issue, though based on a racial classification, did not violate the Due Process clause because there was a legitimate non-racial purpose underlying the preference." (App., *infra*, 8a). If the Ninth Circuit were correct that Indian preferences are racial or national origin distinctions, then such preferences would be subject to strict scrutiny (not the rational basis test this Court applied) no matter how well intentioned the underlying "non-racial purpose" might be. *See Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 1914 (1988) ("Classifications based on race or national origin . . . are given the most exacting scrutiny."); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S.Ct. 2097 (1995) (holding that all government classifications based on race, even if well-intentioned, are subject to strict scrutiny). Thus, the petition for certiorari should be granted to resolve the apparent conflict between the Ninth Circuit's decision and the principles this Court announced in *Morton v. Mancari*.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Harold DAWAVENDEWA, a single man, Plaintiff-Appellant,

v.

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, an Arizona corporation, Defendant-Appellee.

No. 97-15803.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 11, 1998.
Decided Sept. 14, 1998.

Bradley H. Schleier, Schleier Law Offices, Phoenix, Arizona, for plaintiff-appellant.

John J. Egbert, Jennings, Strouss & Salmon, Phoenix, Arizona, for defendant-appellee.

Robert J. Gregory, Equal Employment Opportunity Commission, Washington, D.C., for amicus curiae.

Appeal from the United States District Court for the District of Arizona; Stephen M. McNamee, District Judge, Presiding. D.C. No. CV-96-01165-SMM.

Before: CHOY and REINHARDT, Circuit Judges, and RESTANI, International Court of Trade Judge.*

REINHARDT, Circuit Judge:

Harold Dawavendewa, a Native American, alleges that because he is a Hopi and not a Navajo, he was not

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*The Honorable Jane A. Restani, International Court of Trade Judge, sitting by designation.

considered for a position with a private employer operating a facility on the Navajo reservation. He contends that the employer's conduct constitutes unlawful employment discrimination under Title VII of the Civil Rights Act of 1964. To determine whether Dawavendewa's Title VII complaint may proceed, we address, first, whether discrimination based on tribal affiliation constitutes "national origin" discrimination, and, second, whether such discrimination is permitted under a Title VII provision that allows preferential treatment of Indians in certain specified circumstances.[1]

Salt River Project Agricultural Improvement and Power District ("Salt River"), an Arizona corporation, entered into a lease agreement with the Navajo Nation in 1969. The agreement allows Salt River to operate a generating station on Navajo land provided that it, among other things, grants employment preferences to members of the Navajo tribe living on the reservation, or, if none are available, to other members of the Navajo tribe.[2] This

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[1] We use the terms Indian and Native American interchangeably throughout this opinion. While it is generally desirable for language to retain a fixed meaning, and while unnecessary changes in terminology exacerbate the problems we ordinarily have in understanding each other and in avoiding legal disputes, we recognize that the term Native American has become a part of the common parlance. Nevertheless, the statutes and opinions we examine use the term Indian, which was the appropriate word not so long ago.

[2] The employment provision reads as follows:

> Lessees agree to give preference in employment to qualified local Navajos, it being understood that "local Navajos" means members of the Navajo Tribe living on land within the jurisdiction of the Navajo

preference policy is consistent with Navajo tribal law. *See* 15 Navajo Nation Code § 604 (1995).

Dawavendewa, a member of the Hopi tribe, lives in Arizona less than three miles from the Navajo Reservation.[3] In 1991 he unsuccessfully applied for one of seven Operator Trainee positions at the Salt River generating station. He then filed a complaint alleging that Salt River was engaging in national origin discrimination in violation of Title VII. The complaint alleges that he took and passed a test for the position, ranking ninth out of the top twenty applicants, but was neither interviewed nor considered further for it because he was not a member of, or married to a member of, the Navajo Nation.

> Tribe. All unskilled labor shall be employed from "local Navajos," if available, providing that applicants for employment as unskilled laborers meet the general employment qualifications established by Lessees. Qualified semi-skilled and skilled labor shall be recruited and employed from among "local Navajos." In the event sufficient qualified unskilled, semi-skilled and skilled local Navajo labor is not available, or the quality of work of available skilled or semi-skilled workmen is not acceptable to Lessees, Lessees may then employ, in order of preference, first qualified non-local Navajos, and second, non-Navajos.

[3] We note that the Hopi and Navajo Tribes have been involved in a number of longstanding disputes. *See, e.g., Hopi Tribe v. Navajo Tribe*, 46 F.3d 908 (9th Cir.1995) (rental value of homesites and grazing rights due Hopi Tribe under Navajo-Hopi Settlement Act of 1974); *Masayesva v. Hale*, 118 F.3d 1371 (9th Cir.1997) (recovery of damages relating to use of jointly-held lands).

Salt River moved to dismiss the complaint on the grounds that discrimination on the basis of tribal membership (as opposed to discrimination on the basis of status as a Native American) does not constitute "national origin" discrimination and that Title VII expressly exempts tribal preferences under § 703(i), 42 U.S.C. § 2000e-2 (i) (the "Indian Preferences exemption"). The district court granted the motion to dismiss. It held that Title VII exempts tribal preference policies, and therefore found it unnecessary to decide whether discrimination on the basis of tribal membership constitutes national origin discrimination under Title VII. Dawavendewa appeals.

I.

We first address the issue whether discrimination on the basis of tribal membership constitutes "national origin" discrimination for purposes of Title VII. Title VII prohibits employers from discriminating on the basis of "race, color, religion, sex, or national origin." Civil Rights Act of 1964, § 703(a), 42 U.S.C. § 2000e-2 (a).[4] Although Title VII fails to define "national origin," we have observed that "the legislative history and the Supreme Court both recognize that 'national origin' includes the country of one's ancestors." *Pejic v. Hughes Helicopters,*

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[4] We note that claims of discrimination on the basis of one's status as a Native American are often brought as race discrimination claims, *see, e.g., Weahkee v. Perry,* 587 F.2d 1256 (D.C.Cir.1978), although they have also been brought as national origin claims, *see Perkins v. Lake County Dep't of Utilities,* 860 F.Supp. 1262 (1994).

Inc., 840 F.2d 667, 673 (9th Cir.1988); *see Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88, 94 S.Ct. 334, 38 L.Ed.2d 287 (1973) (noting that "[t]he term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came"). Further, the regulations implementing Title VII provide that discrimination on the basis of one's ancestor's "place of origin" – not *nation* of origin – is sufficient to come within the scope of the statute. *See* 29 C.F.R. § 1606.1.[5] Accordingly, a claim arises when discriminatory practices are based on the place in which one's ancestors lived.

Consistent with the regulations, we have held that the current political status of the nation or "place" at issue makes no difference for Title VII purposes. In *Pejic v. Hughes Helicopters, Inc.*, we considered the issue whether discrimination against Serbians constituted "national origin" discrimination. 840 F.2d 667, 673 (9th Cir.1988). The employer in *Pejic* contended that a Serbian employee could not bring a discrimination claim because Serbia as a nation had long been extinct. We rejected this argument and held that Serbians were a protected class:

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[5] The regulation provides:

> The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.

29 C.F.R. § 1606.1.

> Unless historical reality is ignored, the term "national origin" must include countries no longer in existence. . . . Given world history, Title VII cannot be read to limit "countries" to those with modern boundaries, or to require their existence for a certain time length before it will prohibit discrimination. Animus based on national origin can persist long after new political structures and boundaries are established.

Id. (citation omitted); *see Roach v. Dresser Indus. Valve & Instr. Div.*, 494 F.Supp. 215, 218 (W.D.La.1980) (recognizing discrimination against "Cajuns" as national origin discrimination under Title VII although colony of Acadia no longer exists).

Under the principles set forth in *Pejic* and the Code of Federal Regulations, we have no trouble concluding that discrimination against Hopis constitutes national origin discrimination under Title VII. The status of Indian tribes among the international community and in relation to the United States has, of course, a complicated history that cannot be summarized briefly, and we will not attempt to do so. It is elementary, however, that the different tribes were at one time considered to be nations by the [sic] both the colonizing countries and later the United States. *See* William C. Canby, Jr., *American Indian Law* 68 (1998). In 1832 Chief Justice Marshall wrote:

> The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial. . . .

> The Cherokee nation, then is a distinct community, occupying its own territory, with boundaries accurately described. . . .

Worcester v. State of Georgia, 1832, 31 U.S. (6 Pet.) 515, 559-61, 8 L.Ed. 483. The Court has in more recent times recognized the erosion of the Indian tribes' "nation" status. *See Organized Village of Kake v. Egan*, 369 U.S. 60, 72, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962) (Frankfurter, J.) (noting that "[b]y 1880 the Court no longer viewed reservations as distinct nations"). Currently, the different Indian tribes are generally treated as domestic dependent nations that retain limited powers of sovereignty. *See* William C. Canby, *American Indian Law* 72-87 (1998).

Because the different Indian tribes were at one time considered nations, and indeed still are to a certain extent, discrimination on the basis of tribal affiliation can give rise to a "national origin" claim under Title VII. The fact that "new political structures and boundaries" now exist has no significance. Further, even if the various tribes never enjoyed formal "nation" status, Section 1606.1 of the regulations makes clear that discrimination based on one's ancestor's "place of origin" is sufficient to state a cause of action. Accordingly, under the case law and the regulations interpreting Title VII, tribal affiliation easily falls within the definition of "national origin."

Salt River does not contend that the different Indian tribes are not "nations" for Title VII purposes. Rather, it relies on *Morton v. Mancari*, 417 U.S. 535, 552-554, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974) for the proposition that employment preferences based on tribal affiliation are based on *political affiliation* rather than national origin and are thus outside the realm of Title VII. *Morton* involved a

Due Process challenge to the Bureau of Indian Affair's policy hiring Indian applicants over non-Indian applicants. The Court found that the policy did not constitute an impermissible racial classification because it was "reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups." *Id.* at 554, 94 S.Ct. 2474. However, *Morton* did not involve a claim of discrimination on the basis of membership in a particular tribe. In fact, in *Morton* no claim was made of *any* violation of Title VII. *Morton* simply held that the employment preference at issue, though based on a racial classification, did not violate the Due Process clause because there was a legitimate non-racial purpose underlying the preference: the unique interest the Bureau of Indian Affairs had in employing Native Americans, or more generally, Native Americans' interests in self-governance – interests not present in this case. For these reasons, *Morton* does not affect our conclusion that discrimination in employment on the basis of membership in a particular tribe constitutes national origin discrimination.[6] We therefore

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[6] For similar reasons, this circuit's holding in *Alaska Chapter, Associated Gen. Contractors of Am. v. Pierce*, 694 F.2d 1162 (9th Cir.1982), does not affect our conclusion. *Alaska Chapter* involved an equal protection challenge to a Department of Housing and Urban Development regulation that directs Indian Housing Authorities to give contracting preferences to Indian-owned businesses. That regulation, like the BIA's policy in *Morton* made no distinctions based on tribal affiliation. The court, relying on *Morton*, upheld that regulation on the ground that "[e]ncouraging and assisting Indian-owned businesses helps develop [leadership skills] and furthers the government's trust obligation to help the Indians develop economic self-

conclude that differential employment treatment based on tribal affiliation is actionable as "national origin" discrimination under Title VII.

II.

We now consider whether Salt River's policy of favoring members of the Navajo tribe falls within the exception provided by 42 U.S.C. § 2000e-2(i) (the "Indian Preferences exemption").[7] The Indian Preferences exemption states that

> [n]othing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which preferential treatment is given to any individual *because he is an Indian living on or near a reservation.*

42 U.S.C. § 2000(e)(2)(i) (emphasis added). Salt River maintains that its preferential treatment of Navajos is exempt from Title VII liability under this provision.

The issue whether the Indian Preferences exemption covers preferences on the basis of tribal affiliation has not been decided by the federal courts. The EEOC, however, addressed this precise issue in a 1988 Policy Statement. It

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sufficiency." *Id.* at 1170. *Alaska Chapter* involved an employment preference that was directly authorized by the Indian Self-Determination Act, which, as discussed below, was enacted directly for the furtherance of Native American self-governance.

[7] We note that the Indian tribes themselves are exempt from Title VII liability under § 701(b).

concluded that the "extension of an employment preference on the basis of tribal affiliation is in conflict with and violates Section 703(i) of Title VII." *Policy Statement on Indian Preference Under Title VII,* Fair Empl. Prac. (BNA) 405:6647, 6653 (May 16, 1988). The Commission based its conclusion on three grounds. First, it interpreted the language of the exemption, which applies to preferential treatment towards "any individual because he is an Indian living on or near a reservation," as evidencing Congressional intent to disallow tribal distinctions and "to encourage the extension of employment opportunities to Indians generally." Fair Empl. Prac. 405:6654. It then considered two federal regulations, one issued by the Department of Labor, and the other by the Department of Interior, both of which specifically forbid federal contractors from discriminating on the basis of tribal affiliation as a part of general Indian preference policies. *See id.* (discussing 41 C.F.R. § 60-1.5(a)(6) (1987) and 48 C.F.R. § 1452.204-71 (1987)).[8] Finally, the Commission reasoned that the allowance of tribal preferences could result in inequities in cases in which employers are situated near the reservations of two tribes or near a reservation shared by more than one tribe. *Id.* The EEOC, which has filed an amicus brief on this appeal, adheres to the position it adopted in the 1988 Policy Statement.

Generally, EEOC Guidelines are entitled to some deference. *See Albemarle Paper Co. v. Moody,* 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). The level of deference,

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[8] The Department of Interior regulation was implemented pursuant to the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450e(b).

however, depends on the EEOC's thoroughness of consideration, validity of its reasoning, consistency with earlier and later pronouncements, and power of persuasion. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991).[9] "Ultimately, EEOC statements of policy 'should always be considered, but they should not be regarded as conclusive unless reason and statutory interpretation support their conclusion.' " *Yerdon v. Henry*, 91 F.3d 370, 376 (2nd Cir.1996) (internal citations omitted). We give the EEOC's Policy Statement due weight, and for reasons we make clear in the discussion which follows, we agree with its conclusion that the Indian Preferences exemption does not allow discrimination based on tribal affiliation.

We now examine the language and purpose of the statutory exemption. The exemption applies to "preferential treatment . . . given to any individual *because he is an Indian* living on or near a reservation." § 2000e-2 (i) (emphasis added). The term "Indian" is generally used to draw a distinction between Native Americans and all others. *See Perkins v. Lake County Dep't of Utilities*, 860 F.Supp. 1262, 1274 (N.D.Ohio 1994) (citing *Felix S. Cohen's Handbook of Federal Indian Law* 2 (1971)). An employment practice of giving preference to members of a particular tribe does not afford preference to an applicant "because he is an Indian," but rather because he is a member of "a

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[9] A cynic might suggest that how much deference we give to an EEOC Guideline depends on how much we agree with it, or even that we apply the Commission's Guidelines when we think they're right and don't when we think they're wrong. That's surely not what the Court intended in *Arabian Am. Oil Co.*, however.

particular tribe." Such a preference is not consistent with the objectives of the Indian Preferences exemption. While the statute exempts the hiring of Indians from the force of the anti-discrimination in employment provisions, it does so in order to compensate for the effects of past and present unjust treatment, not in order to authorize another form of discrimination against particular groups of Indians – tribal discrimination. It seems evident that, under the exemption, favored treatment could not be given to Indian males at the expense of Indian women, or to Indians of mixed blood in derogation of the rights of those who are entirely of Indian ancestry. The purpose of the Indian Preferences exemption is to authorize an employer to grant preferences to *all* Indians (who live on or near a reservation) – to permit the favoring of Indians over *non*-Indians. The exemption is not designed to permit employers to favor members of one Indian tribe over another, let alone to favor them over all other Indians. To so read the provision would be to immunize two forms of discrimination not just one – discrimination on account of Indian status and discrimination on account of tribal membership. The statute on its face reaches only the former. In short, we read the term "because he is an Indian" to mean precisely what it says. The reason for the hiring must be because the person is an Indian, not because he is a Navajo, a male Indian, or a member of any other formal subset of the favored class.

Salt River contends, however, that allowing tribal preferences would be "consistent with" the congressional intent underlying the Indian Preferences exemption provision. Its argument rests primarily on language from *Morton*, which, as discussed above, does not support its

position. Indeed, Salt River can point to no legislative history that supports its reading of the Indian Preferences exemption.[10]

Instead, Salt River and the district court decision rely heavily on the 1994 amendments to the Indian Self-Determination and Education Assistance Act (ISDA). The ISDA, originally enacted in 1975, allows tribes to contract with the Departments of the Interior and Health and Human Services to administer programs otherwise administered by those Departments ("self-determination contracts") in order to establish

> a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

25 U.S.C. § 450(a)(b) (Supp.1998); *State of Alaska ex rel. Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't*, 101 F.3d 1286, 1299 (9th Cir.1996) ("as expressed by the Self-Determination Act, Indian self-determination

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[10] The legislative history on this exemption is sparse. The EEOC points to general language that suggests that the Indian Preferences exemption was a means to combat the general problem of Indian unemployment on or near reservations rather than to promote the strength of individual tribes. *See Morton v. Mancari*, 417 U.S. 535, 545-46, 94 S.Ct. 2474, 41 L.Ed.2d 290 (quoting Remarks of Senator Humphrey, 110 Cong. Rec. 12723) (1964) ("This exemption is consistent with the Federal Government's policy of encouraging Indian employment and with the special legal position of Indians"). We generally find the legislative history to be inconclusive and do not rely on it.

involves increased participation of Native Americans in the administration of federal programs"), *rev'd on other grounds, Alaska v. Native Village of Venetie Tribal Gov't*, ___ U.S. ___, 118 S.Ct. 948, 140 L.Ed.2d 30 (Feb. 25, 1998); *Pierce*, 694 F.2d at 1170 (noting that purposes of the Indian Self-Determination Act is to develop leadership skills as well as economic self-sufficiency). One subsection of the ISDA, § 450(b)(1), provides that contracts under the chapter must require that preferences be "given to Indians" with respect to training and employment opportunities. The 1994 Amendment provided that *despite* subsection 450(b)(1), "tribal employment or contract preference law adopted by such tribe will govern" with respect to self-determination contracts.[11]

The 1994 Amendment provides no support for Salt River's argument that Congress intended the Indian Preferences exemption to cover discrimination based on tribal affiliation. First, whatever Congress decided to do with

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[11] The amendment provides in full:

> Notwithstanding subsections (a) and (b) of this section, with respect to any self-determination contract, or portion of a self-determination contract, that is intended to benefit one tribe, the tribal employment or contract preference laws adopted by such tribe shall govern with respect to the administration of the contract or portion of the contract.

25 U.S.C. § 450(c) (Supp.1998).

The 1994 Amendment was passed in response to a proposed regulation interpreting the ISDA to require preferences to Indians "regardless of tribal affiliation." 59 Fed.Reg. 3166, 3185 (Jan. 20, 1994).

respect to amending the ISDA in 1994 has little if anything to do with what it intended when it drafted Title VII thirty years earlier. Second, the ISDA and Title VII have fundamentally different purposes that make the analogy Salt River seeks to draw of little value: While Title VII provides relief for individual cases of discrimination by employers, the purpose of ISDA is to shift control of certain federal programs and services that benefit particular tribes to the tribes themselves. Third, the ISDA governs a very limited set of employment situations – those arising pursuant to particular contracts between tribes and two departments within the federal government. 25 U.S.C. § 450b(j); *see FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1234 (8th Cir.1995) (holding that, by definition, private parties cannot enter self-determination contracts). Salt River is unquestionably not an employer acting pursuant to a self-determination contract subject to the ISDA. Accordingly, we conclude that the tribal preferences exception contained in the ISDA does not support Salt River's interpretation of the Indian Preferences exemption.

To the contrary, we find that the recent amendment to the ISDA supports the EEOC's position. The fact that Congress felt the need to pass the 1994 Amendment only bolsters the contention that general Indian preference policies were not intended to allow distinctions among different tribes. When Congress decided that tribal affiliation preferences were appropriate in the context of self-determination contracts, it responded through the

enactment of the 1994 Amendment.[12] It has passed no similar amendment with respect to Title VII. The fact that Congress now requires a narrowly-defined set of contracts to honor local tribal preference policies not only fails to support the argument that it intended to accomplish that same objective in 1964 when passing Title VII, but it suggests quite the opposite proposition. It shows us that when Congress wishes to allow tribal preferences, it adopts an appropriate amendment to the applicable statute.[13]

Salt River's final argument is that subjecting Salt River to Title VII liability would "frustrate" the purposes of the ISDA as amended in 1994. There is, however, no conflict between allowing tribal preferences under a self-determination contract, the entire purpose of which is to promote the *self-governance* of a tribe through the administration of federal programs, and not allowing those preferences in other private employment situations. As already mentioned, there is no contention that the Salt River agreement falls within the scope of the ISDA and little argument that permitting discrimination against

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[12] There is no indication that the 1994 Amendment was merely a "clarifying" amendment. Indeed, the 1994 Amendment begins, "*Notwithstanding* subsections (a) and (b) of this section." Accordingly, Congress felt the need to indicate that *despite* the general Indian preference policy, tribal preference policies would apply.

[13] Salt River argues that the Policy Statement has lost persuasive value because one of the regulations on which it relies has been superseded by the 1994 Amendment. For the reasons just discussed, Congress' actions with respect to the ISDA and the revision of regulations pursuant to those actions does not affect our interpretation of the Title VII exemption.

Hopi Indians would help achieve the goals of the ISDA. Preferential employment of Navajo Indians on a privately-owned facility, while certainly helpful to the tribe's employment problems, has little to do with increasing the tribe's capacity for self-governance. Further, other federal regulations that provide for general Indian preferences in employment contexts explicitly disallow discrimination based on tribal affiliation. *See, e.g.*, 23 C.F.R. § 635.117(d) (1997) (employment by state highway agencies); 25 C.F.R. § 256.3(b) (1997) (participation in Housing Improvement Program of BIA).[14] We conclude that Congress' decision to permit tribal preferences under the ISDA is in no way frustrated by our construction of Title VII as precluding such preferences in other types of employment.[15]

Finally, we note the possible inequities that would arise in allowing tribal affiliation discrimination, particularly in areas where there are many different tribal reservations. Under Salt River's interpretation of the provision, any private employer situated near a Hopi *and* Navajo reservation could arbitrarily institute a blanket-

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[14] Salt River questions the continuing validity of these regulations in light of the 1994 Amendment. As discussed above, the 1994 Amendment only affected a particular set of employment situations. Congress simply has not instituted a blanket-approval of tribal preferences in the context of either federal employment or private employment.

[15] We do note, however, that a conflict between Title VII and ISDA may arise when a private employer is hired pursuant to the ISDA. Because this conflict does not arise here, we do no attempt to resolve it and limit our holding to employment situations that do not fall within the scope of 28 U.S.C. 450e(c).

policy of preferential treatment towards members of one or the other of the tribes. Further, private employers would have license to pass over those Native Americans who live on a particular reservation but who do not share the same tribal affiliation as the governing body of the reservation.[16] Without a clear indication to the contrary, this appears to be the sort of individual discrimination wholly within the scope of Title VII.

Based on our reading of the Indian Preferences exemption, and informed by the 1994 Amendment to the ISDA, we conclude that the exemption does not include preferences based on tribal affiliation. If Congress wishes to amend Title VII to accommodate tribal preferences, as it did with respect to the ISDA, it may do so. Because Congress has not yet chosen that course, and because there is no dispute that the Salt River policy constitutes a tribal preference policy, the district court erred in dismissing the complaint.

CONCLUSION

We conclude that Salt River's conduct as described in the complaint constitutes "national origin" discrimination under Title VII and does not fall within the scope of the Indian Preferences exemption. Accordingly, the district

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[16] *See Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 911 (9th Cir.1995) (noting "continued presence of Navajo Indians on 900,000 acres of the Hopi Reservation in northern Arizona").

court's Rule 12(b)(6) dismissal was improper, and we reverse.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

HAROLD DAWAVENDEWA, a single man, Plaintiff, v. SALT RIVER PROJECT ARGRICULTURAL [sic] IMPROVEMENT AND POWER DISTRICT, an Arizona corporation, Defendant.	CIV 96-1165-PHX-SMM **MEMORANDUM OF DECISION AND ORDER** (Filed Apr. 16, 1997)

Plaintiff, a member of the Hopi Nation, filed this action on May 13, 1996, pursuant to Title VII of the Civil Rights Act of 1968 [sic], 42 U.S.C. §§2000 *et seq.* Plaintiff alleges that Defendant Salt River Project Agricultural Improvement and Power District ("SRP") unlawfully discriminated against him by failing to hire him for a position with the Navajo Generating Station pursuant to a Navajo hiring preference provision of the SRP lease. Considered herein is Defendant's motion to dismiss filed on September 19, 1996 under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I. STANDARD OF REVIEW

In deciding a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a court must presume all factual allegations of the complaint to

be true. *Miree v. DeKalb County, Georgia*, 433 U.S. 25, 27 n.2 (1977); *NL Indus. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). Although the complaint is construed in the light most favorable to the plaintiff, legal conclusions couched as factual allegations, however, are not given a presumption of truthfulness. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981).

II. DISCUSSION

In 1969, Defendant SRP entered into a lease with the Navajo Nation pursuant to which Defendant operates the Navajo Generating Station located on the Navajo reservation. The lease provides that Defendant SRP as the lessee shall give employment preference to "local Navajos" meaning "members of the Navajo Tribe living on land within the jurisdiction of the Navajo Tribe." In the event that sufficient local Navajo labor is not available preference must then be given first to non-local Navajos, then to non-Navajos.

Plaintiff, a member of the Hopi Nation, lives less than three miles from the Navajo Reservation. Compl. at ¶11. In 1991, Plaintiff applied for one of seven advertised Operator Trainee positions at the Navajo Generating Station. *Id.* at ¶12. Plaintiff passed the test for the position, ranking ninth of the top 20 applicants. *Id.* at ¶¶13 & 14. However, when it was determined that Plaintiff was not a member of the Navajo Nation or married to a member, Plaintiff was given no further consideration for employment. *Id.* at ¶15.

On March 15, 1992, Plaintiff filed a charge with Equal Employment Opportunity Commission (EEOC) for

national origin discrimination in violation of Title VII. *Id.* at ¶19. On May 28, 1993, the EEOC issued a finding that Plaintiff had been discriminated against on the basis of national origin with regard to Defendant's failure to hire Plaintiff. *Id.* at ¶20. Plaintiff received a Notice of Right to Sue on February 15, 1996. *Id.* at ¶21.

Plaintiff brings this action on behalf of himself, and "all non-Navajo Native American individuals not hired by Defendant at the Navajo Generating Station by Defendant after January 21, 1992, and non-Navajo Native Americans who have been deterred from seeking employment with Defendant as a result of its discriminatory and illegal conduct." *Id.* at ¶22.

Defendant moves to dismiss this action on the bases that (1) Title VII expressly exempts Defendant's Navajo preference practice, (2) to find otherwise is inconsistent with Congressional intent to further tribal self-government, and (3) Navajo and non-Navajo are "political distinctions" outside the purview of a national origin claim. Plaintiff argues that whether a private corporation may discriminate among differing groups of Native Americans is an issue of first impression. Plaintiff contends that an affirmative decision is unsupported by the plain meaning of the language of Title VII and recent amendments to the Indian Self-Determination Act (ISDA), 25 U.S.C. § 450 *et seq.*, and contrary to the EEOC's position on the issue.

A. Title VII of the Civil Rights Act of 1968 [sic]

Title VII of the Civil Rights Act of 1964 prohibits discrimination in private employment on the basis of 'race, color, religion, sex, or national origin.' 42 U.S.C. § 2000e-2(a); *Morton v. Mancari*, 417 U.S. 535, 545, 94 S.Ct. 2474, 2480 (1974). Two sections of the Act, however, explicitly exempt preferential employment of Indians by Indian tribes or private industries located on or near Indian reservations. *See* 42 U.S.C. §§ 2000e(b) and 2000e-2i; *Morton*, 417 U.S. at 545, 94 S.Ct. at 2480. Section 701(b) exempts Indian tribes from the definition of an "employer". 42 U.S.C. § 2000e(b). Section 703(i) reads:

> Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

42 U.S.C. § 2000e-2(i). The exemptions reveal a clear congressional recognition of "the longstanding federal policy of providing a unique legal status to Indians in matters concerning tribal or 'on or near' reservation employment." *Morton*, 417 U.S. at 548, 94 S.Ct. at 2482.

The issue of tribal preference as discriminatory under Title VII is one of first impression. The one context in which it has been addressed directly is an EEOC Policy Statement issued on May 16, 1988. The EEOC's Policy Statement on Indian Preference Under Title VII, effective May 16, 1988, opined that the extension of an employment preference on the basis of tribal affiliation violates

Section 703(i) of Title VII. Plaintiff argues that, the issue being one of first impression, the Court should give deference to the EEOC's interpretation of the scope of § 703(i) of Title VII.

Where a statute is silent or ambiguous as to a particular issue, the Court must first attempt to determine Congressional intent. *Almero v. INS*, 18 F.3d 757, 763 (9th Cir. 1994). Where this step fails, a court should adopt the agency's interpretation if reasonable. *Id.* In the Policy Statement, noting that Title VII is silent on the issue, the EEOC attempted to determine Congressional intent by looking to regulations prohibiting tribal affiliation discrimination promulgated by (1) the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor to promote and insure equal opportunity for all persons by federal contractors and subcontractors,[1] and (2) by the Department of the Interior implementing § 7(b) of the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450e(b).[2]

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[1] The regulation reads in pertinent part:

> Contractors or subcontractors extending such a preference shall not, however, discriminate among Indians on the basis of religion, sex, or tribal affiliation . . .

41 C.F.R. § 60-1.5(a)(6) (1987).

[2] The regulations require the following provision to be inserted in specified contracts:

> The Contractor agrees to give preference to Indians who can perform the work required regardless of age (subject to existing laws and regulations), sec [sic], religion, or tribal affiliation for training and employment opportunities under this

The accuracy of the EEOC's determination of congressional intent is questionable in light of recent amendments to the regulations and statutes upon which it relied. First, in 1988, Congress amended the ISDA "to increase tribal participation through contracting in the management of Federal Indian programs and to help ensure long-term financial stability for tribally-run programs." 59 Fed. Reg. 3166 (1994). Included was a requirement that preferences be given to Indians in employment and training to the extent possible. *See* 25 U.S.C. § 450e(b). Then in October, 1994, Congress amended the ISDA to provide:

> Notwithstanding subsections (a) and (b), with respect to any self-determination contract, or portion of a self-determination contract, that is intended to benefit one tribe, the tribal employment or contract preference laws adopted by such tribe shall govern with respect to the administration of the contract or portion of the contract.

25 U.S.C. § 450(c). In so amending, Congress rejected a proposed regulation implementing 25 U.S.C. § 450e(b) giving preference to Indians to the greatest extent possible *regardless of tribal affiliation. See* 59 Fed. Reg. 3185

> contract and, to extent feasible consistent with the efficient performance of this contract, training and employment preferences and opportunities shall be provided to Indians regardless of age (subject to existing laws and regulations), sex, religion, or tribal affiliation who are not fully qualified to perform under this contract.

See 48 C.F.R. § 1452.204-71.

(1994) (proposed Jan. 20, 1994) (emphasis added). Congress explained their intent to endorse tribal employment rights ordinances (TERO) over the general Indian preference established by the ISDA to resolve an ongoing tribal government conflict. *See* S.Rep. No. 374, 103d Cong., 2d Sess. 5 (1994).

Plaintiff argues that the amendments to the Indian Self-Determination Act permitting tribal affiliation preferences, although analogous, should not be broadened beyond the context of "self-determination contracts" specifically provided for within the ISDA. It is entirely appropriate for this Court to look toward the recent amendments in other Indian preference laws for guidance regarding congressional intent. *See Morton*, 417 U.S. at 548-9, 94 S.Ct. at 2481-82 (discussing the Indian preference laws set forth in the Education Amendments of 1972, 86 Stat. 235, 20 U.S.C. §§ 887c(a) and (d), and § 1119a (1970 ed., Supp. II), in finding that the preference provisions of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e(b) and 2000e-2(i), were not impliedly repealed by the silence on the issue in the Equal Employment Opportunity Act of 1972). Moreover, failing to do so may result in determining a congressional intent of one statute that entirely frustrates that of another, impermissibly attributing "irrationality and arbitrariness" to the acts of Congress. *See Morton*, 417 U.S. at 548, 94 S.Ct. at 2481.

Plaintiff provides no authority, other than the now questionable EEOC opinion, for the proposition that § 703(i) should not encompass discrimination on the basis of tribal affiliation. In addition, Plaintiff fails to suggest how either the strong federal policy of promoting tribal self-government is not frustrated or, alternatively, what

congressional intent is instead furthered, by federal prohibition of the tribal affiliation employment preference on or near the respective tribe's reservation. The Court, therefore, finds that Title VII is not implicated by a provision of a lease granted by an Indian Tribe to a private company that requires a tribal preference in employment.

IV. CONCLUSION

The Court finds that consistent with the federal commitment toward promoting tribal self-government, § 703(i) includes tribal affiliation preferences in the context of employment on or near the respective Indian reservation as exempted from Title VII of the Civil Rights Act. In so holding the Court declines to decides [sic] whether "Indians" is always a political or racial classification. For the foregoing reasons,

IT IS THEREFORE ORDERED Defendant's Motion to Dismiss filed September 19, 1996 is **GRANTED.** [DOC. #5]

IT IS FURTHER ORDERED the Clerk of the Court shall enter judgment and terminate this action accordingly.

DATED this 15 day of April, 1997.

/s/ Stephen M. McNamee
Stephen M. McNamee
United States District Judge

Copies to all counsel of record

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAROLD DAWAVENDEWA, a single man, Plaintiff-Appellant, v. SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, an Arizona corporation, Defendant-Appellee.	No. 97-15803 D.C. No. CV-96-01165 **ORDER** (Filed Jan. 13, 1999)

Before: CHOY and REINHARDT, Circuit Judges, and RESTANI, International Court of Trade Judge.*

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Jane A. Restani, International Court of Trade Judge, sitting by designation.